IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES MORRONE, JR.,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	No. 98-5381
CITY OF PHILADELPHIA, et al.,	:	
Defendants.	:	

MEMORANDUM

GREEN, S.J. **July , 2001**

Presently before the court is Defendant City of Philadelphia's Motion for Summary Judgment, Plaintiff's Response thereto and Plaintiff's Supplemental Memorandum. For the following reasons, Defendant City of Philadelphia's motion will be granted in part and denied in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, James Morrone, Jr., alleges that on September 1, 1996 at approximately 12 a.m., he was "assaulted, threatened, beat[en] and verbally abused," "without legal cause or other justification," by off duty police officers from the 12th District of the City of Philadelphia Police Department ("Defendant City"). (See Compl. § 10.) While Plaintiff was walking home, Police Officers Stephen Roffo ("Defendant Roffo") and Tom Rehiel ("Defendant Rehiel") allegedly tackled Plaintiff and broke his eyeglasses. (See Def. City's Ex. B at 7.) Defendant Roffo allegedly kicked Plaintiff in the face and torso, while Defendant Rehiel held Plaintiff. (See Pl.'s Ex. 2 at 6, 17-21.) Dozens of police officers from the 12th District allegedly watched the incident from a nearby parking lot where they were holding a beer and music party. (See Pl.'s Ex.s 1 at 17-18; 4 at 9-12.) Plaintiff was treated at Fitzgerald Mercy Hospital for his injuries. (See Def.

City's Ex.s B at 8, C; Pl.'s Ex. 3.)

The Internal Affairs Division of the Police Department conducted an investigation into the incident and issued a report. (See Def. City's Ex. B.) The report concluded that Defendant Roffo assaulted Plaintiff, and Defendant Rehiel violated the Philadelphia Police Department's Disciplinary Code.[1] Upon receiving the report, the Philadelphia District Attorney's Office charged Defendant Roffo with aggravated assault, simple assault and recklessly endangering another person. (See Def. City's Ex. E.) On March 2, 2000, Defendant Roffo pled guilty to simple assault and recklessly endangering another person. (See Def. City's Ex. E.) On May 15, 1998, Defendant City suspended Defendant Roffo's employment with the intent to dismiss. (See Def. City's Ex. C.) No criminal charges were brought against Defendant Rehiel.

Plaintiff filed the instant action on or about October 29, 1998, bringing claims against Defendants City, Roffo, Rehiel, John Doe and Jane Doe under 42 U.S.C. §§ 1983 and 1988 for alleged violations of his civil rights pursuant to the First, Fourth and Fourteenth Amendments to the Constitution of the United States and the laws of the Commonwealth of Pennsylvania. On January 3, 2001, Defendant City filed a Motion for Summary Judgment. Plaintiff filed a Response and Supplemental Memorandum.

II. DISCUSSION

Summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

[1]Specifically, the investigators determined that Plaintiff was kicked by Defendant Roffo and tackled by Defendant Rehiel. (See Def. City's Ex. B at 7-8.)

of law." Fed. R. Civ. P. 56(c). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Once the moving party has carried the initial burden of showing that no genuine issue of material fact exists, the non-moving party cannot rely on conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact. Pastore v. Bell Telephone Co. of Pa., 24 F.3d 508, 511 (3d Cir. 1994). The nonmoving party, instead, must establish the existence of every element essential to his case, based on the affidavits or by the depositions and admissions on file. Id. (citing Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992)); see also Fed.R.Civ.P. 56(e). The evidence presented must be viewed in the light most favorable to the non-moving party. Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983).

1. Section 1983

To state a claim under 42 U.S.C. § 1983, a plaintiff must show that a defendant, acting under color of state law, deprived the plaintiff of a right secured by the Constitution or laws of the United States. See 42 U.S.C. § 1983.[2] A municipality can be held liable as a person under Section 1983 when it constitutionally implements or enforces "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by" the officers of that municipality. Monell v. Dep't of Social Services, 436 U.S. 658, 690 (1978). A municipality's failure to train

[2]Title 42 U.S.C. § 1983 provides in relevant part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

or supervise police officers only gives rise to a constitutional violation when that failure amounts to deliberate indifference to the rights of persons who the police come into contact. See City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989). To show deliberate indifference, a plaintiff must show both (1) contemporaneous knowledge of the offending incident or knowledge of a prior pattern or similar incidents; and (2) circumstances under which the supervisor's actions or inaction would be found to have communicated a message of approval to the offending subordinate. See Bonenberger v. Plymouth Township, 132 F.3d 20, 25 (3d Cir. 1997).

Defendant City moves for summary judgment as to Plaintiff's Section 1983 claim on the ground that Plaintiff has "no admissible evidence anywhere on the record to prove the elements necessary to hold the City liable in this case." (See Def. City's Mem. Supp. Summ. J. at 7.) Defendant City avers that Plaintiff cannot present any evidence that Defendant City (1) failed to train, supervise and discipline its officers in accord with constitutional standards; (2) failed to establish an effective off-duty policy; and (3) failed to adequately assess the emotional and psychological fitness of its officers. Instead, Defendant City argues that Defendants Roffo and Rehiel were investigated and disciplined with respect to the present allegations.[3] In addition, Defendant City contends an effective off-duty policy existed at the time of the alleged incident. Although the policy was codified in February of 1998—after the alleged incident—Defendant City contends that it was in existence for many years and officers were instructed in that policy.

[3]Although prior complaints were filed against Defendants Roffo and Rehiel, Defendant City argues that those complaints were insufficient to place Defendant City on notice that Defendants Roffo and Rehiel were violating citizen's rights. Defendant City contends that there is no evidence that the prior complaints were similar in nature to the present matter, or that Defendant City failed to conduct an investigation into the complaints.

Plaintiff argues that he has produced sufficient evidence to show that Defendant City acted with deliberate indifference concerning his legal rights by failing to train its officers and failing to investigate and discipline officers who have a pattern of physically abusive conduct. To support his claim, Plaintiff introduced "Officer Complaint History" reports for Defendants Roffo and Rehiel. (See Pl.'s Ex.s 7, 8.) Defendant Roffo's report shows that, during his nine (9) year tenure with the Department, five (5) complaints, not including Plaintiff's complaint, were filed against him. (See Pl.'s Ex. 7.) Defendant City concluded that all five (5) complaints, two (2) of which alleged physical assaults, were "unfounded" or "not sustained." (See Pl.'s Ex. 7.) Defendant Rehiel's report shows that three (3) complaints, not including Plaintiff's complaint, were filed against him. (See Pl.'s Ex. 8.) Defendant City concluded that all three (3) complaints were "unfounded" or "not sustained." (See Pl.'s Ex. 8.) Plaintiff also submitted Annual Performance reports of Defendants Roffo and Rehiel in which their performances were rated "satisfactory" in all categories and cited for "promotional potential."[4] (See Pl.'s Ex.s 7, 8.)

Plaintiff also avers that Defendant acted with deliberate indifference concerning his legal rights by failing to enforce current policy and failing to establish a policy to prevent constitutional violations by off-duty officers. Plaintiff introduced witness testimony alleging that officers drank alcohol openly outside the 12th District police station in violation of Philadelphia law.[5] (See Pl.'s Ex.s 1 at 17-18; 4 at 9-12; 5 at 6-8; 10.) Plaintiff argues that the evidence

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[4]In addition, Plaintiff argues that Defendant Roffo was approved for a transfer to the Stakeout Unit and Defendant Rehiel was promoted to Sergeant. (See Pl.'s Ex. 7, Pl's Resp. at 11.) Defendant Rehiel was allegedly promoted to Sergeant on November 11, 1996, approximately two (2) months after the incident involving Plaintiff. (See Pl.'s Resp. at 11.)

[5]"No person shall consume alcoholic beverages or carry or possess an open container of alcoholic beverages in the public right-of-way or on private property without the express

supports a finding that supervisors were aware of this activity, because the parking lot was subject to constant surveillance due to its proximity to the police station. (See Pl.'s Ex. 9 at 2.) Plaintiff also argues that no off-duty policy existed when Plaintiff was allegedly assaulted, and Defendant failed to introduce any evidence to the contrary. Plaintiff contends that Defendant City's failure to dismiss and/or discipline Defendants Roffo and Rehiel based upon prior complaints, coupled with its failure to enforce current policy and establish an effective off-duty policy sent a message of approval to Defendants Roffo and Rehiel regarding their conduct, thereby proximately causing the "assault" on Plaintiff.[6]

Viewing the evidence in a light most favorable to Plaintiff, I find that there is a genuine issue of material fact regarding whether Defendant City failed to train, investigate and discipline its officers and whether those failures amounted to deliberate indifference regarding Plaintiff's legal rights. Although Defendant City contends that Plaintiff's claims are unsubstantiated, Plaintiff has presented sufficient evidence to create a genuine issue of fact regarding whether Defendant City, through the implementation of a custom, violated Plaintiff's rights under the Constitution and laws of the United States. It appears, from the Officer Complaint History Reports and performance reviews of Defendants Roffo and Rehiel, that a reasonable jury could find that a custom exists within the 12th District Police Department to disregard citizen

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permission of the landowner or tenant." Philadelphia Code § 10-604(2)(b).

[6]In its response to Defendant City's motion, Plaintiff also moved to impose sanctions on Defendant City for its "utter failure to comply with Fed.R.Civ.P. 26(a)(1)." (See Pl.'s Resp. at 5.) Plaintiff alleges that during discovery, Defendant City never filed mandatory pre-trial disclosure. Plaintiff, however, failed to demonstrate the circumstances in which Defendant City failed to comply with Rule 26(a)(1). Plaintiff's motion for sanctions will be denied without prejudice to being resubmitted with evidence to support the motion.

complaints and reward the alleged offending officers with "satisfactory" performance reviews and advancement. (See Pl.'s Ex.s 7, 8.) Prior to the Plaintiff's complaint, there is no evidence that Defendants Roffo and Rehiel were disciplined for the eight (8) total alleged offenses against citizens, nor is there any evidence that the complaint history for Defendants Roffo and Rehiel had any effect on their performance reviews. A reasonable jury could find that this custom encourages police officers to disregard the legal rights of its citizens and, in this case, the legal rights of Plaintiff. Accordingly, Defendant City's Motion for Summary Judgment will be denied at to the federal claims.

2. State Law Claims

Under Pennsylvania law, the Political Subdivision Tort Claims Act ("the Act") grants municipal agencies immunity from liability for all state law tort claims. See 42 Pa.C.S.A. § 8541 et seq.; City of Philadelphia, Police Dept. v. Gray, 633 A.2d 1090, 1093 (Pa. 1993); Mascaro v. Youth Study Center, 523 A.2d 1118, 1119 (Pa. 1987). The Act provides that "no local agency shall be liable for any damages on account of any injury to a person or property caused by an act of the local agency or an employee thereof of any other person." Id. Injured parties may recover in tort from a municipality only if: (1) damages would be otherwise recoverable under common law or statute; (2) the injury was caused by the negligent act of the local agency or an employee acting within the scope of his official duties; and (3) the negligent act of the local agency falls within one of eight enumerated categories. See 42 Pa.C.S.A. § 8542; Lindstrom v. City of Corry, 763 A.2d 394, 397 (Pa. 2000); White by Pearsall v. School Dist. of Philadelphia, 718 A.2d 778, 779 (Pa. 1998). The eight (8) exceptions to the grant of general immunity are: (1) vehicle liability; (2) the care, custody and control of personal property; (3) the care, custody and control

of real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) the care, custody and control of animals. See 42 Pa.C.S.A. § 8542. These exceptions must be constructed strictly because of the clear legislative intent to insulate government from exposure of tort liability. See Lockwood v. City of Pittsburgh, 751 A.2d 1136, 1139 (Pa. 2000) (citing Kiley v. City of Philadelphia, 645 A.2d 1184, 185-186 (Pa. 1994)). The Act also provides that a local agency may not be held liable where the actions complained of are employee acts which constitute a "crime, actual fraud, actual malice, or willful misconduct." See 42 Pa.C.S.A. § 8550.

Defendant City moves for summary judgment as to Plaintiff's "state law negligence claims" in Count II of the Complaint on the ground that it is immune from liability for those claims. (See Def. City's Mem. Supp. Summ. J. at 8.) Count II alleges that:

> The acts and conduct of all defendants alleged in the above stated cause of action were in concert and conspiracy with each other and constitute assault and battery, intentional infliction of emotional distress, outrageous conduct, invasion of privacy, defamation, tortious interference with constitutional rights, negligence, gross negligence, and as against defendant City, negligent hiring, training, retention and supervision under the laws of the Commonwealth of Pennsylvania . . . .

In response, Plaintiff asserts:

> To the extent that defendant City seeks the shield of municipal immunity for negligent acts plaintiff does not disagree. However, the individual defendants are sued in their official and individual capacities and they remain liable as does the City for conduct which is reckless. Certainly, at a minimum, the city's retention of defendant Roffo could be deemed reckless conduct as could the absence of a policy governing off-duty police activity and the police department's failure to enforce public drinking laws against its own officers.

(See Pl.'s Resp. at 24, n.10.)

Upon review of the statute and the parties' arguments, I conclude that Defendant City is immune from liability for state law claims alleged in Count II of the Complaint. Contrary to Plaintiff's contention, "reckless" conduct by Defendant City is insufficient to subject Defendant City to liability.[7] Instead, Defendant City's conduct must be negligent and fall within one of the eight (8) exceptions to the grant of general immunity. Plaintiff has failed to introduce any evidence which demonstrates that the claims against Defendant City in Count II fall under any of the eight (8) exceptions to the grant of general immunity. Accordingly, Defendant City's Motion for Summary Judgment will be granted as to the claims against Defendant City in Count II of the Complaint.

An appropriate Order follows.

[7]Moreover, Defendant City moves only on its behalf and not on behalf of any of the other Defendants. (See generally Def. City's Mem. Supp. Summ. J.) Therefore, this opinion does not address the liability of any of the officers named as defendants in this matter.

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CITY OF PHILADELPHIA, et al.	:	
Defendants.	:	

ORDER

AND NOW, this day of July, 2001, upon consideration of Defendant City of Philadelphia's Motion for Summary Judgment and the responses thereto, **IT IS HEREBY ORDERED** that Defendant City of Philadelphia's Motion for Summary Judgment will be **GRANTED** as to the claims against Defendant City of Philadelphia in Count II of the Complaint and **DENIED** in all other respects.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.